



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2004

Ms. Larae N. Idleman
Bracewell & Patterson, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2004-5749A

Dear Ms. Idleman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206435.

On behalf of the Pasadena Independent School District (the "district"), which you represent, you ask this office to re-examine Open Records Letter No. 2004-5749 (2004). When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previously issued ruling. As we have determined that Open Records Letter No. 2004-5749 is incorrect, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2004-5749 and serves as the correct ruling.

The district received a request for all attorney fee bills submitted to the district related to the requestor's son and five other named individuals since 1989. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, you assert that the district "should not be required to produce attorney's fees dated prior to 1998, as the requestor has previously submitted an identical request for these documents." In response, this office issued Open Records Letter Nos. 1998-1782 (1998) and 1998-1032 (1998). We note, however, that section 552.022 of the Government Code was amended in 1999.² As amended, section 552.022(a)(16) requires that "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege" is not excepted from required disclosure unless it is "expressly confidential under other law." Section 552.107 of the Government Code is a discretionary exception to disclosure and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 676 at 6 (2002) (section 552.107 is not "other law" for purposes of section 552.022); *see also In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" within meaning of section 552.022). Therefore, the law existing at the time of the issuance of the previous rulings has changed. Consequently, the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have not been met in this situation.³ *See* Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). Thus, you may not rely on those rulings in this case, and we will address your claimed exceptions in regard to all of the requested information.

We begin by noting that the requested information is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). As the requestor is the parent of the child at issue, the requestor has a right of access to the submitted records under FERPA. Accordingly, the records at

²*See* Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 5 (amending Gov't Code § 552.022).

³The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

issue generally may not be withheld pursuant to an exception to disclosure under the Public Information Act (the "Act"). See *Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); Open Records No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Thus, the responsive information is not excepted from disclosure under section 552.103 of the Government Code.

With respect to your claim under the attorney-client privilege, however, the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right of access under FERPA to information about the parent's child does not prevail over a school district's right to assert the attorney-client privilege. Therefore, we next consider whether the district may withhold any of the submitted information under the attorney-client privilege.

We note that the responsive documents consist of attorney fee bills that are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, the information in the responsive attorney fee bills must generally be released unless it is expressly confidential under other law or protected by the attorney-client privilege. As previously discussed, section 552.107 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See Open Records Decision No. 676 at 6 (2002) (section 552.107 is not "other law" for purposes of section 552.022); see also Open Records Decision No. 522 (1989) (discretionary exceptions in general). However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Rule 503 of the Texas Rules of Evidence.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer.") A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

A governmental body seeking to withhold information from public disclosure pursuant to the attorney-client privilege must: (1) demonstrate that the document at issue is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) demonstrate that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Open Records Decision No. 676 (2002).

You state that "the detailed portions of the records sought which identify specific services by attorneys are privileged and confidential." You have not identified which, if any, of the individuals listed in the fee bills is a representative of the district. We have reviewed the submitted documents and marked the information that we are able to discern from the face of the bills constitutes privileged communications; only this information may be withheld pursuant to Rule 503. *See Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

Finally, you assert section 552.101 of the Government Code. This section excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You have not directed our attention to any law, nor are we aware of any law, under which any of the remaining information in question is considered to be confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the remaining submitted information

is excepted from disclosure under section 552.101 of the Government Code, and it must be released to the requestor.

In summary, we conclude that the district may withhold the information we have marked under Rule 503 of the Texas Rules of Evidence. All remaining responsive information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 200000

Enc: Submitted documents

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(w/o enclosures)